99TH CONGRESS
2d Session

SENATE

TREATY DOC.
99-14

INVESTMENT TREATY WITH PANAMA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF PANAMA CONCERNING THE TREATMENT AND PROTECTION OF INVESTMENTS, WITH AGREED MINUTES, SIGNED AT WASHINGTON, OCTOBER 27, 1982

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MARCH 25, 1986.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for use of the Senate

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LETTER OF TRANSMITTAL

THE WHITE HOUSE, *March 25, 1986.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments, with Agreed Minutes, signed October 27, 1982, at Washington. I transmit also, for the information of the Senate, the report of the Department of State with respect to this treaty.

This treaty is among the first six treaties to be transmitted to the Senate under the Bilateral Investment Treaty (BIT) program that I initiated in 1981. The BIT program is designed to encourage and protect U.S. investment in developing countries. The treaty is an integral part of U.S. efforts to encourage Panama and other governments to adopt macroeconomic and structural policies that will promote economic growth. It is also fully consistent with U.S. policy toward international investment. That policy holds that an open international investment system in which participants respond to market forces provides the best and most efficient mechanism to promote global economic development. A specific tenet, reflected in this treaty, is that U.S. direct investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment. Under this treaty, the parties also agree to international law standards for expropriation and compensation; free financial transfers; and procedures, including international arbitration, for the settlement of investment disputes.

I recommend that the Senate consider this treaty as soon as possible, and give its advice and consent to ratification of the treaty, with agreed minutes, at an early date.

RONALD REAGAN.

READEX FICHE

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, February 20, 1986.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty between the United States and the Republic of Panama concerning the Treatment and Protection of Investments, with Agreed Minutes, signed at Washington, October 27, 1982. This treaty is among the first six treaties to be negotiated under the bilateral investment treaty (BIT) program which you initiated in 1981. Development of the BIT program and the negotiation of the individual treaties have been pursued by the Office of the United States Trade Representative and the Department of State with the active participation of the Department of Commerce and the U.S. Treasury, in conjunction with other interested U.S. Government agencies. I recommend that this treaty, as well as the others concluded with the Kingdom of Morocco, the Republic of Haiti, the Republic of Senegal, Republic of Turkey, and the Republic of Zaire, be transmitted to the Senate for its advice and consent to ratification.

In 1981 you initiated the global bilateral investment treaty (BIT) program to encourage and protect U.S. investment in developing countries. By providing certain mutual guarantees and protections, a BIT creates a more stable and predictable legal framework for foreign investors in each of the treaty Parties. The negotiations of a series of bilateral treaties with interested countries establishes greater international discipline in the investment area.

The six treaties which have been signed as well as others under negotiation are an integral part of U.S. efforts to encourage other governments to adopt macroeconomic and structural policies that will promote economic growth. They are also fully consistent with your policy statement on international investment of September 9, 1983, which states that international direct investment flows should be determined by private market forces and should receive fair, equitable and non-discriminatory treatment.

Our experience to date has shown that interested countries are willing to provide U.S. investors with significant investment guarantees and assurances as a way of inducing additional foreign investment. It is our policy to advise potential treaty partners that conclusion of a BIT with the United States is an important and favorable factor in the investment relationship, but does not in and of itself result in immediate increases in U.S. investment flows.

Congressional support for the BIT program is reflected in Section 601 (a) and (b) of the Foreign Assistance Act, as amended, in particular at Section 601(b) which provides:

> In order to encourage and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this Act, the President shall . . . (3) accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to, and its equitable investment in, friendly countries and areas participating in programs under this Act.

BITs are consistent in purpose with the network of treaties of Friendships, Commerce and Navigation (FCNs) which the United States negotiated from the early years of the Republic until the last successful negotiations with Thailand and Togo in the late 1960s. They continue the U.S. policy of securing by agreement standards of equitable treatment and protection of U.S. citizens carrying on business abroad, and institutionalizing processes for the settlement of disputes between investors and host countries, and between governments. We expect that a series of bilateral treaties with interested countries will establish greater international discipline in the investment area.

The BIT was designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment. In pursuit of this objective, the model BIT adopts FCN language and concepts. Traditional FCN provisions granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language concerning investment protection. Perhaps most significantly, the BIT goes beyond the traditional FCN to provide investor-host country arbitration in instances where an investment dispute arises.

Our BIT approach followed similar programs that had been undertaken with considerable success by a number of European countries, including the Federal Republic of Germany and the United Kingdom, since the early 1960s. Indeed, our industrialized partners already have nearly two hundred BITs in force, primarily with developing countries. Our treaties, which draw upon language used in the U.S. FCN treaties as well as European counterparts, are more comprehensive and far-reaching than European BITs.

THE U.S.-PANAMANIAN TREATY

The treaty with Panama was negotiated by an inter-agency team led by officials from the Office of the United States Trade Representative and the Department of State. The treaty satisfies all four main BIT objectives:

> Foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favorably than investors of the host country and no less favorably than investors of third countries, whichever is the most favorable treatment, ("national" and "most-favored-nation" treatment) subject to certain specified exceptions;
>
> International law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation;

Free transfers shall be afforded to funds associated with an investment into and out of the host country; and

Procedures are to be established which allow an investor to take a dispute with a Party directly to binding third-party arbitration.

The provisions on treatment of foreign investment and arbitration, and in particular Panama's acceptance of international law as the governing law, mark an important achievement for the BIT program and our investment and international arbitration policies.

A technical memorandum explaining in detail the provisions of this treaty will be transmitted separately to the Senate Committee on Foreign Relations. That technical memorandum explains, clause by clause, the provisions of the treaty with Panama.

Some provisions of the treaty with Panama differ in minor respects from the U.S. model text. In general, however, the treaty closely follows the language contained in the U.S. negotiating model, the most significant provisions of which are as follows.

The model BIT's definition section clarifies terms such as "company of a Party" and "investment." The BIT concept of "investment" is broad and designed to be flexible; although numerous types of economic interests are enumerated, the intent is to include all legitimate interests in the territory of either Party, whether directly or indirectly controlled by nationals of the other, having economic value or "associated" with an investment. Protected "companies of a Party" are those incorporated or otherwise organized under the laws of a Party in which nationals of that Party have a substantial interest.

The model BIT accords the better of national or most-favored-nation (MFN) treatment to foreign investment, subject to each Party's exceptions which are listed in a separate Annex. The exceptions are designed to protect state regulatory interests and for the United States to accommodate the derogations from national treatment in state or federal law relating to such areas as air transport, shipping, banking, telecommunications, energy and power production, insurance, and from national and MFN treatment in the case of ownership of real property. Any future exceptions to these standards which a Party adopts are not to affect existing investments. The BIT also includes general treatment protections designed to be a guide to interpretation and application of the treaty. Thus, the Parties agree to accord investments "fair and equitable treatment" and "full protection and security" in no case "less than that required by international law." It specifically grants nationals of a Party the right to establish investments in the territory of the other Party, restricts the right to impose performance requirements, and obliges Parties to observe their contractual obligations with investors. The U.S. model also provides that nationals and companies of either Party shall in the territory of the other Party be permitted to employ professional, technical and managerial personnel of their choice regardless of nationality.

The model BIT also confers protection from unlawful interference of property interests and assures compensation in accordance with international law standards. It provides that any direct or indirect taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective com-

pensation; and in accordance with due process of law and the general standards of treatment discussed above. The BIT's definition of "expropriation" is broad and flexible; essentially "any measure" regardless of form, which has the *effect* of depriving an investor of his management, control or economic value in a project can constitute expropriation requiring compensation equal to the "fair market value." Such compensation, which "shall not reflect any reduction in such fair market value due to . . . the expropriatory action," must be "without delay," "effectively realizable," "freely transferable" and "bear current interest from the date of the expropriation at a rate equal to current international rates." The BIT grants the right to "prompt review" by the relevant judicial or administrative authorities in order to determine whether the compensation offered is consistent with these principles. It also extends national and MFN treatment to investors in cases of loss due to war or other civil disturbance. The BIT does not provide, however, a specific valuation method for compensating such losses.

The model BIT provides for free transfers "related to an investment," specifically of returns, compensation for expropriation, contract payments, proceeds from sale, and contributions to capital for maintenance or development of an investment. Such transfers are to be made in a "freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred." The model text recognizes that notwithstanding this guarantee Parties can maintain certain laws and regulations regarding transfers provided these are applied in a non-discriminatory fashion. In particular, the model BIT provides that Parties can require reports of currency transfers and impose income taxes by such means as a withholding tax on dividends.

The model BIT provides that where certain defined investment disputes arise between a Party and a national or company of the other Party, including disputes as to the interpretation of an investment agreement, and the dispute cannot be solved through negotiation, it may be submitted to arbitration in accordance with any dispute-settlement procedures to which the national or company and the host country have previously agreed. Unless the national or company has submitted the dispute to previously agreed dispute settlement procedures or to adjudication by domestic courts or other tribunals of the host country, the national or company may submit the dispute to the International Centre for the Settlement of Investment Disputes ("ICSID"). Exhaustion of local remedies is not required. In a separate provision, the BIT Parties also agree to grant nationals and companies of the other Party access to their domestic courts in order to assert claims and enforce rights with respect to investments.

The model BIT provides for state-to-state arbitration between the Parties in case of a dispute regarding the interpretation or application of the treaty. In the absence of an agreement that other rules apply, the BIT refers the Parties to specific procedural rules which must govern the arbitration. The BIT also outlines the procedures for the creation of the arbitral panel.

The model BIT exhorts Parties to apply their tax policies fairly and equitably. Because the United States specifically addresses tax

matters in tax treaties, the BIT generally excludes such matters. It also specifically limits the arbitration provisions to only certain taxation matters. Another BIT provision exempts disputes arising under Export-Import Bank programs, or other credit guarantee or insurance arrangements providing for alternative dispute settlement arrangements, from the standard BIT arbitration clauses. The model BIT also states that the treaty shall not derogate from any obligations that require more favorable treatment of investments and declares that the treaty shall not preclude measures necessary for public order or essential security interests. The model BIT enters into force 30 days after exchange of ratifications and continues in force for at least ten years. Thereafter, either Party may terminate the treaty, subject to one year's written notice.

Each of these model provisions was developed after lengthy and extensive consultations within the U.S. Government and with the private sector. Nonetheless, in negotiating a particular treaty, the U.S. Government retains, of course, some flexibility to adopt modifications as necessary and in light of experience. While the U.S. model text has recently been simplified, the provisions summarized above have all been retained.

Some provisions of the treaty with Panama differ in minor respects from the U.S. model text, although none of the changes represent substantive departures from U.S. objectives. The more significant modifications are as follows:

(1) General treatment language—Article II of the Panama text provides for the standard general treatment contained in the U.S. model text, i.e., the better of national or MFN treatment. However, while the model BIT stipulates that conditions of "competitive equality" shall be maintained between private investments of one Party and host-country private and public-sector investments, the Panama text provides for "fair and equitable treatment" in such situations. (Article II, paragraph 3.)

(2) Performance requirements—Although Article II, paragraph 4, of the Panama text, like the model text, restricts the imposition of performance requirements, Panama noted its practice of granting benefits to investors under its "incentive laws" when investments are "established." (Agreed Minutes, paragraph 2.)

(3) Employment laws—The Panama text, like the U.S. model, states that nationals and companies of either Party may employ in the territory of the other Party top managerial personnel of their choice regardless of nationality. The hiring of other professional, technical and managerial personnel is, however, made "subject to the employment laws of each Party." (Article III, paragraph 2.) The Parties agree to apply such laws "flexibly, taking into account, *inter alia*, the nature of the investment, the requirements of the positions in question, and the availability of qualified nationals." (Agreed Minutes, paragraph 3.)

(4) Compensation for Requisitioning and Destruction of Property—The first model BIT would have obligated a Party which requisitions property or destroys property in non-combat situations to pay compensation. The Panama text omits this provision. This omission is not signifiant since these principles are already established under international law and the clause was omitted in its entirety from the revised model BIT.

(5) Requirement to make public all investment laws—Unlike the U.S. model text, the Panama text does not include any obligation to make public all laws, regulations, administrative practices and procedures affecting investments. Such a clause was deemed unnecessary since Panamanian laws have always been readily available.

(6) Compensation upon expropriation and transfers—The Panama text essentially adopts the U.S. model's definition of what constitutes a lawful expropriation but its elaboration of "adequate compensation," uses the term "full value" and not "fair market value," as used in the model. (Article IV, paragraph 1.) Given the other assurances contained in the Panama BIT, this difference is not substantive. The Panama text also specifically acknowledges that the estimate of the full value of an investment "can be made using several methods of calculation." (Agreed Minutes, paragraph 4.) This merely emphasizes an issue which is implicit in the U.S. model text. Concerning the payment of interest, the text does not specify that such payment be from the date of expropriation. Further, since Panama uses U.S. currency, there is no provision requiring that payments be freely transferable "at the market rate of exchange on the date of the expropriation." For the same reason, Article VI of the Panama text, on transfers, is much less specific than the U.S. model. The text asserts only that current and capital transactions shall remain "unrestricted" and "free".

(7) Dispute settlement—The Panama text refers to the possibility of recourse to the Inter-American Commercial Arbitration Commission as well as to the Additional Facility of ICSID. (Article VII, paragraph 2.) There is no equivalent to the U.S. model clause stating that where there is a choice between binding arbitration or conciliation between a host government and a national or company of the other Party, the opinion of the national or company prevails.

(8) General scope of treaty—The Panama text provides that the treaty will not apply to any existing dispute which predates the entry into force of the treaty, unless the dispute comes within the terms of Article IV ("expropriation") and does not predate ratification by more than three years. (Article XIII, paragraph 2.) (The United States is presently seeking clarification from the Government of Panama that for purposes of Article XIII, paragraph 2, "ratification" means the exchange of ratifications which triggers entry into force.) Like the U.S. model, the Panama text grants national and companies of either Party access to the other Party's domestic courts in order to bring claims and enforce rights related to investments. The Panama text confers this right by including it among a list of specified activities, including the making, performance and enforcement of contracts, which the Parties agree are activities "associated" with an investment and therefore entitled to treaty protection. (Article II, paragraph 1.) This listing is included as part of the "Agreed Minutes" between the Parties. (Agreed Minutes, paragraph 1 (a–j).) These Minutes are meant to clairify the Parties' intent. They are integral parts of the Treaty. The fact that provisions are set apart in Agreed Minutes, rather than in the main text of the treaty, is of no legal significance.

(9) Exemptions from coverage—In the Annex to the Treaty, Panama exempts from the obligation to grant national treatment and the right of establishment communications, representation of

foreign firms, distribution and sale of imported products, retail trade, insurance, state companies, private utility companies, energy production, practice of liberal professions, custom house brokers, banking, natural resources exploitation (including fisheries and hydroelectric power), and ownership of certain lands. Except for the ownership of real estate, investors must receive at least MFN treatment in all exempted sectors and matters.

(10) Clarification of public order exception—Because of political sensitivities in Panama, the Panamanians insisted on a separate exchange of notes (information copy attached) clarifying the standard provision in the BIT which exempts measures taken for public order. In these notes the Parties agree that this exception is not meant to authorize either Party to take such measures in the territory of the other.

(11) Applicability to political subdivisions—Article XII of the Panama text contains a clause from the model text providing that the substantive treaty obligations accepted by each Party equally apply to political subdivisions of the respective Parties. (This superfluous clause has been deleted from the later, simplified model BIT). The Agreed Minutes attempt to clarify this clause by providing that the treaty applies to states, territories, and possessions of the United States "wherever relevant." (Agreed Minutes, paragraph 6.) This clause was included to avoid the interpretation that the treaty binds U.S. states to procedural treaty obligations such as the duty to arbitrate or to engage in negotiations. Thus, in cases where a U.S. state violates the substantive obligations of the treaty, the U.S. Government, and not the respective state, is the proper Party in any subsequent arbitration, although the state in question will be bound by the result.

Submission of this treaty, together with the other five noted above, marks a significant development in our international investment policy. I join with the United States Trade Representative and other U.S. Government agencies in supporting these treaties and favor their approval by the Senate at an early date.

Respectfully submitted.

GEORGE P. SHULTZ.

Enclosures: As stated.

PANAMA, *July 12, 1985.*

No. 054.

His Excellency JORGE ABADIA ARIAS,
Minister of Foreign Relations,
Panama, Republic of Panama.

EXCELLENCY: I have the honor to acknowledge receipt of your Excellency's Note DGPE-EUC-No. 172/12-7 dated July 1, 1985 concerning the Treaty between the United States of America and the Republic of Panama regarding the Treatment and Protection of Investment, signed on the 27th of October, 1982 in Washington, D.C. The substance of that Note reads as follows:

> I have the honor to confirm the understanding that was arrived at during the negotiation of the Treaty between the Republic of Panama and the United States of America

regarding the Treaty and Protection of Investment, signed on the 27th of October, 1982 in Washington, D.C.

Paragraph 1 of Article X refers only to those domestic measures taken by either Party the object of which is to maintain public order, fulfill its obligations with respect to the maintenance or restoration of international peace and security or protect its own essential security interests.

It is understood that nothing in the provisions of this paragraph of Article X authorizes or has the intention of authorizing either Party to take such measures in the territory of the other.

If the Government of the United States of America is in agreement with the content of this Note, on the understanding set forth herein, I have the honor to propose that said Note, together with Your Excellency's affirmative reply, constitute an agreement between our two Governments, concerning this issue, which will enter in effect from July 1, 1985.

I take this opportunity to renew to Your Excellency, the assurances of my highest and most distinguished consideration.

In reply, I have the honor, on behalf of the Government of the United States of America, to confirm the understanding set forth in Your Excellency's Note, and we agree that your note and this reply shall constitute an agreement between our two governments which shall enter into force on the date of this reply with effect from July 1, 1985.

Accept, Excellency, the renewed assurances of my highest and most distinguished consideration.

EVERETT E. BRIGGS.

DEPARTMENT OF STATE, DIVISION OF LANGUAGE SERVICES

[TRANSLATION]—LS No. 117911, WD/BP, Spanish]

REPUBLIC OF PANAMA,
MINISTRY OF FOREIGN RELATIONS,
Panama, Panama.

DGPE–EUC–No. 172/12–7, July 1, 1985.

His Excellency EVERETT ELLIS BRIGGS,
Ambassador of the United States of America,
Panama, Republic of Panama.

MR. AMBASSADOR: [The English translation of this note that is quoted in American Embassy, Panama, note No. 054 of July 12, 1985, agrees in all substantive respects with the original Spanish text.]

JORGE ABADIA ARIAS,
Minister of Foreign Relations.

Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments

The United States of America and the Republic of Panama,

Desiring to promote economic cooperation between them by creating favorable conditions for investment by nationals and companies of one Party in the territory of the other Party,

Recognizing that the encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States,

Have agreed as follows:

ARTICLE I

For the purposes of this Treaty:

(a) "national of a Party" means a natural person who is a national or citizen of that Party under its laws;

(b) "company" means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or publicly owned, or organized with limited or unlimited liability;

(c) "company of a Party" means a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof in which:

(i) natural persons who are nationals of such Party, or

(ii) such Party or a political subdivision thereof or their agencies or instrumentalities

have a substantial interest as determined by such Party.

The juridical status of a company of a Party shall be recognized by the other Party and its political subdivisions.

Each Party reserves the right to deny to any of its own companies or to a company of the other Party the advantages of this Treaty, except with respect to recognition of juridical status and access to courts, if nationals of any third country own or control such company; provided that whenever one Party concludes that the benefits of this Treaty should not be extended to a company of the other Party for this reason, it shall consult with the other Party to seek a mutually satisfactory resolution to this matter;

(d) "investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how; and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment;

(e) "own or control" means ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located; and

(f) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; and return in kind.

ARTICLE II

1. Each Party shall maintain favorable conditions for investment in its territory by nationals and companies of the other Party. Each Party shall permit and treat such investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or to maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty, or resulting from laws and regulations in effect on the date that this Treaty enters into force. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to maintain the number of such exceptions to a minimum. Any exception, other than with respect to ownership of real property, shall be on a basis according treatment no less favorable than that accorded in like situations to investment, or associated activities, of nationals or companies of any third country. Moreover, any future exception by either Party shall not apply to investment of nationals or companies of the other Party existing in that sector at the time the exception becomes effective.

2. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The

treatment, protection and security of investment shall be in accordance with applicable national laws and international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.

3. Each Party agrees to provide fair and equitable treatment and, in particular, the treatment provided for in paragraph 1 of this Article, to privately owned or controlled investment of nationals or companies of the other Party, where such investment is in competition, within the territory of the first Party, with investment owned or controlled by the first Party or its agencies or instrumentalities. In no case shall such treatment differ from that provided to any privately owned or controlled investment of nationals or companies of the first Party which is also in competition with investment owned or controlled by the Party or its agencies or instrumentalities.

4. Neither Party shall impose performance requirements as a condition for the establishment of investment owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

ARTICLE III

1. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, directing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

2. Nationals and companies of either Party, and companies which they own or control, shall be permitted to engage, within the territory of the other Party, top managerial personnel of their choice, regardless of nationality. Moreover, subject to the employment laws of each Party, nationals and companies of either Party shall be permitted to engage, within the territory of the other Party, professional, technical and managerial personnel of their choice, regardless of nationality, for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of their investment.

ARTICLE IV

1. Investment of a national or a company of either Party shall not be expropriated, nationalized, or subject to any other direct or indirect measure having an effect equivalent to expropriation or nationalization ("expropriation") in the territory of the other Party, except for a public or social purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process and the general princi-

ples of treatment laid down in Article II(2). Such compensation shall amount to the full value of the expropriated investment immediately before the expropriatory action became known; include interest at a commercially reasonable rate; be paid without delay; be effectively realizable; and be freely transferable.

2. Consistent with Article I(d), if either Party expropriates the investment of any company duly incorporated, constituted or otherwise duly organized in its territory, and if nationals or companies of the other Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, then the Party within whose territory the expropriation occurs shall ensure that such nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

ARTICLE V

In the event that a national or a company of one of the Parties suffers a loss in its investment in the territory of the other Party because of war or other type of armed conflict, insurrection, state of national emergency, riot or terrorism, it shall not be treated less favorably, with regard to restitution, adjustments, indemnifications or other payments for such loss, in accordance with the laws of such other Party, than nationals or companies of such other Party, or nationals or companies of any third country, whichever are treated most favorably.

ARTICLE VI

Each Party agrees, with respect to investments made within its territory by nationals or companies of the other Party, that current and capital transactions shall remain unrestricted and that payments and other transfers with respect to such transactions shall continue to be free.

ARTICLE VII

1. For purposes of this Article, an investment dispute is defined as a dispute involving: (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party, the parties to the dispute shall initially seek to resolve it by consultation and negotiation. The Parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third party procedures, such as the fact-finding facility available under the Rules of the Additional Facility ("Additional Facility") of the International Centre for the Settlement of Investment Disputes ("Centre"). If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the

applicable dispute settlement procedures upon which they have previously agreed. Such procedures may provide for recourse to international arbitration using a forum such as the Inter-American Commercial Arbitration Commission. With respect to expropriation by either Party, any dispute settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable, in accordance with, inter alia, the terms of the investment agreement, relevant provisions of the domestic laws of such Party, and Treaties and other international agreements regarding enforcement of arbitral awards to which such Party has adhered.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the Additional Facility for settlement, either by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Additional Facility, provided the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute, and the national or company concerned has not brought the dispute before the courts of justice, administrative tribunals or agencies of competent jurisdiction of either Party.

(b) Each Party hereby consents to the submission of an investment dispute to the Additional Facility for settlement by conciliation or binding arbitration.

(c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Regulations and Rules of the Additional Facility.

(d) Each Party shall provide for the enforcement within its territory of Additional Facility arbitral awards.

4. In any proceeding, judicial, arbitral or otherwise, concerning an investment dispute between it and a national or company of the other Party, a Party shall not assert, as a defense, counter claim, right of set off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whatsoever, whether public or private, including such other Party and its political subdivisions, agencies and instrumentalities.

5. For the purpose of any proceedings before the Additional Facility in accordance with this Article, any company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was owned or controlled by nationals or companies of the other Party, shall be treated as a national or company of such other Party.

6. The provisions of this Article shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE VIII

1. Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through consultations between representatives of the two Parties, and if this should fail, through other diplomatic channels.

2. If the dispute between the Parties cannot be resolved through the aforesaid means, and unless there is agreement between the Parties to submit the dispute to the International Court of Justice, both Parties hereby agree to submit it upon the request of either Party to an arbitral tribunal for binding decision in accordance with the applicable rules and principles of international law.

3. The Tribunal shall be established for each case as follows. Within two months of receipt of a request for arbitration, each Party shall appoint an arbitrator. The two arbitrators so appointed shall select a third arbitrator as Chairman, who is a national of a third State. The Chairman shall be appointed within two months of the date of appointment of the other arbitrators.

4. If the required appointments have not been made within the time specified in paragraph 3 of this Article, either of the Parties may, in the absence of any other agreement, request that the President of the International Court of Justice make the required appointments. If the President is a national of one of the Parties or if he cannot otherwise perform said duties, the Vice President shall be asked to make the required appointments. If the Vice President is a national of one of the Parties or if he cannot otherwise perform said duties, the next most senior member of the International Court of Justice who is not a national of one of the Parties and is able to perform said duties shall be asked to make the required appointments.

5. In the event that an arbitrator resigns or is for any reason unable to perform his duties, a replacement shall be appointed within thirty days, utilizing the same method by which the arbitrator being replaced was appointed. If the replacement is not appointed within the time limit specified above, either Party may invite the President of the International Court of Justice to make the necessary appointment. If the President is a national of either of the Parties or is unable to act for any reason, either Party may invite the Vice President, or if he is also a national of either of the Parties or is unable to act for any reason, the next most senior member of the International Court of Justice who is not a national of one of the Parties and is able to perform said duties, to make the appointment.

6. Unless otherwise agreed to by the Parties to the dispute, all submissions shall be made and all hearings shall be completed within six months of the date of the selection of the third arbitrator, and the Tribunal shall render its decision within two months of the later of the date of the final submissions or the date of the closing of the hearings.

7. The Tribunal shall decide in all matters by majority vote. Any such decision shall be binding on both Parties. Each Party shall bear the expenses of its own representation in the arbitration proceedings. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceeding shall be paid for equally by

the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties. Such a decision shall be binding.

8. The Parties may agree to specific arbitral procedures. In the absence of such agreement, the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission in 1958 ("Model Rules") and commended to Member States by the United Nations General Assembly in Resolution 1262 (XIII) shall govern. To the extent that procedural questions are not resolved by this Article or the Model Rules, they shall be resolved by the Tribunal.

9. This Article shall not be applicable to a dispute which has been submitted to the Additional Facility pursuant to Article VII (3). Recourse to the procedures set forth in this Article is not precluded, however, in the event an award rendered in such dispute is not honored by a Party; or an issue exists related to a dispute submitted to the Additional Facility but not argued or decided in that proceeding.

10. The provisions of this Article shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export Import Bank of the United States, or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE IX

1. This Treaty shall not supersede, prejudice, or otherwise derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

whether extant at the time of entry into force of this Treaty or thereinafter, that entitle investments, or associated activities, of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.

2. This Treaty shall not derogate from or terminate any other agreement entered into by the two Parties and in force as between the two Parties, on the date on which this Treaty enters into force.

ARTICLE X

1. This Treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments in its territory of nationals and companies of the other

Party, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE XI

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, this Treaty shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article IV;

(b) transfers, pursuant to Article VI; or

(c) the observance and enforcement of terms of an investment agreement or authorization, as referred to in Article VII (1) (a) or (b).

ARTICLE XII

This Treaty shall apply to political subdivisions of the Parties.

ARTICLE XIII

1. This Treaty shall be ratified by the Parties, and the instruments of ratification thereof shall be exchanged as soon as possible.

2. This Treaty shall enter into force thirty days after the date of exchange of ratifications.

It shall remain in force for a period of ten years, and shall continue in force unless terminated in accordance with Paragraph 3 of this Article. It shall apply to any investment existing at the time of its entry into force as well as to any investment made or acquired thereafter. However, this Treaty shall not apply to any dispute, claim or suit predating the date of ratification of this Treaty, unless such dispute comes within the terms of Article IV and does not predate ratification by more than three years.

3. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten-year period or at any time thereafter.

4. With respect to any investment existing at the time this Treaty enters into force, and to any investment made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed this Treaty.

DONE at Washington this twenty-seventh day of October, 1982 in the English and Spanish languages, both texts being equally authentic.

For the Government of the United States of America:

WILLIAM E. BROCK, Jr.

For the Government of the Republic of Panama:

AQUILINO E. BOYD.

ANNEX

Consistent with the provisions of Article II(1), each Party reserves the right to make or to maintain limited exceptions within each of the sectors of matters listed below:

The United States of America

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; use of lands and natural resources; custom house brokers; ownership of real estate; radio and television broadcasting; telephone and telegraph services; submarine cable services; satellite communications.

The Republic of Panama

Communications; representation of foreign firms; distribution and sale of imported products; retail trade; insurance; state companies; private utility companies; energy production; practice of liberal professions; custom house brokers; banking; rights to the exploitation of natural resources including fisheries and hydroelectric power production; and ownership of land located within 10 kilometers of the Panamanian border.

Each Party will notify the other of the details of the exceptions mentioned above.

AGREED MINUTES

The duly authorized Plenipotentiaries of the Parties have agreed upon the following provisions clarifying their intent in respect of certain Articles of the Treaty Concerning Treatment and Protection of Investment signed this date, which shall be considered integral parts of the Treaty:

1. With respect to Article II (1), the Parties agree that associated activities include:

(a) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business;

(b) the employment of professional, technical and managerial personnel of their choice, regardless of nationality, for the particular purpose of rendering professional, technical and managerial assistance necessary for the planning and operation of an investment;

(c) the organization of companies under applicable laws and regulations; the acquisition of companies or interests in companies or in their property; and the management, control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution or other disposition, of companies organized or acquired;

(d) the making, performance and enforcement of contracts;

(e) the acquisition (whether by purchase, lease or otherwise), ownership and disposition (whether by sale, testament or otherwise), of personal property of all kinds, both tangible and intangible;

(f) the leasing of real property appropriate for the conduct of business;

(g) the acquisition, maintenance and protection of copyrights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights;

(h) the borrowing of funds from local financial institutions, as well as the purchase and issuance of equity shares in the local financial markets;

(i) the use of means of communication, transport and public utilities; and

(j) access to courts of justice, administrative tribunals and agencies, and the right of employment of persons by nationals or companies of the other Party, who otherwise qualify under applicable laws and regulations of the forum, regardless of nationality, for the purpose of asserting claims and enforcing rights, including those arising under the provisions of this Treaty, with respect to their investment and associated activities.

2. With respect to the treatment of investment as set forth in Article II, the Republic of Panama has incentive laws granting benefits to duly constituted companies which sign contracts with the government in which they agree to meet the requirements established therein.

3. In referring to employment laws in Article III(2), the Parties mean all laws regulating the terms and conditions of employment, including equal employment opportunity laws, preferential hiring laws, and anti-discrimination laws as well as laws relating to the training of local employees in order to qualify them for all professional, technical, and managerial positions. Each Party recognizes the right of the other Party to maintain such laws and also agrees to apply its own such laws on a non-discriminatory basis with repect to investment by nationals or companies of the other Party, consistent with the provisions of Article II(1). As for any laws requiring employment of its own nationals in certain positions or the employment of a certain percentage of its own nationals in positions in connection with investment made in its territory by nationals or companies of the other Party, each Party agrees to administer such laws flexibly, taking into account, *inter alia,* the nature of the investment, the requirements of the positions in question, and the availability of qualified nationals.

4. With respect to Article IV(1), both Parties understand that the estimate of the full value of expropriated investment can be made using several methods of calculation depending on the circumstances thereof.

5. The Parties agree that Article VI does not preclude: a) the United States from maintaining laws and regulations requiring reporting of currency transfers into or out of the United States; or b) either Party from maintaining laws and regulations imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors or litigants, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its laws.

6. In amplification of Article XII, with respect to the United States of America, references to a Party and to applicable laws and

regulations in this Treaty shall include wherever relevant the States, Territories and possessions of the United States, and their laws and regulations respectively.

National treatment accorded under the provisions of this Treaty to companies of Panama shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies incorporated, constituted or otherwise duly organized in other States, Territories or possessions of the United States.

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